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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 68-5027

EARNEST JAMES AIKENS, JR.,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

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The National Legal Aid and Defender Association files this brief Amicus Curiae pursuant to the written consent of the parties.

INTEREST OF AMICUS CURIAE.

The National Legal Aid and Defender Association is an organization composed of over 1,000 legal aid and defender offices in America. In addition 3,000 individual members, most of whom are private practioners, are numbered among their ranks. The main concern of the

organization is with the rights of the indigent in our legal and criminal justice systems.

The Defender offices elect a nine man defender committee composed of public defenders from Florida to California to set policy and supervise the Defender component of the organization. On April 28, 1971 the Defender Committee, meeting in New Orleans, unanimously adopted a resolution condemning the use of capital punishment. Among the grounds urged for the abolition of capital punishment was the belief that contemporary standards of human decency had evolved to the point that the death penalty ought to be declared unconstitutional as violative of the cruel and unusual provisions of the eighth amendment.

OPINION BELOW.

The opinion of the California Supreme Court in *People* v. *Aikens* is reported at 70 Adv. Cal. 383, 74 Cal. Rptr. 882, 450 P. 2d 258 (1969).

JURISDICTION.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. Sec. 1257 (3).

STATUTORY PROVISIONS INVOLVED.

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States. The relevant California statutory provisions are: (1) California Penal Code Sec. 190 and (2) California Penal Code Sec. 190.1.

QUESTION PRESENTED.

Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

STATEMENT OF THE CASE.

The National Legal Aid and Defender Association adopts Appellant's Statement.

ARGUMENT.

THE CRUEL AND UNUSUAL CLAUSE OF THE EIGHTH AMENDMENT IS A DYNAMIC CONCEPT WHICH NOW MUST BE APPLIED TO RENDER THE DEATH PENALTY UNCONSTITUTIONAL.

In *Trop* v. *Dulles,* 356 U.S. 86 (1958) this Court held that the Eighth Amendment prohibition against cruel and unusual punishment was a dynamic concept dependent upon the "evolving standards of decency that mark the progress of a maturing society."

Although it is true that at the time of the adoption of the Eighth Amendment capital punishment was practiced in colonial America, our notions of what constitutes cruel and unusual punishment have undergone significant changes.

In *Ex Parte Wilson,* 114 U.S. 417 Mr. Justice Gray noted,

> "What punishment may be considered as infamous may be affected by the changes of opinions from one age to another. In former times, being put in the stocks was not considered as necessarily infamous. . . . But at the present day it might be thought an infamous punishment."

Robinson v. *California,* 370 U.S. 660 held the cruel and unusual clause of the Eighth Amendment applicable to the states. Since that time there has arisen a significant body of law construing that clause and reflecting contemporary notions of what is or is not "cruel and unusual punishment."

These cases make it clear that contemporary standards of human decency have evolved to the point where imposition of the death penalty must now be held to violate the cruel and unusual clause of the Eighth Amendment.

A. PUNISHMENTS LESS SEVERE THAN THE DEATH PENALTY HAVE BEEN HELD CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT.

In *Jackson* v. *Bishop*, 404 F. 2d 571 (1968) Justice Blackmun, writing for the Eighth Circuit Court of Appeals, held that the use of a prison strap as a disciplinary measure in the Arkansas Penitentiary constituted cruel and unusual punishment under the Eighth Amendment.

Reviewing this Court's decisions on the issue, Justice Blackmun stated,

> "In summary then so far as the Supreme Court cases are concerned, we have a flat recognition that the limits of the Eighth Amendment's proscription are not easily or exactly defined, and we also have clear indications that the applicable standards are flexible, that disproportion, both among punishments and between punishment and crime, is a factor to be considered, and that broad and idealistic concepts of dignity, civilized standards, humanity and decency are useful and usable." at 579.

He went on to say that

> "the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess; and that it also violates those standards of good conscience and fundamental fairness enunciated by this court. . . ."

Justice Blackmun relied in part on *Jordan* v. *Fitzharris*, 257 F. Supp. 674 (1969), in which the District Court for the Northern District of California had held that conditions of confinement in the California Correctional Training Facility at Soledad constituted cruel and unusual punishment. Those conditions consisted of the prisoner being confined in a small cell 6 feet by 8 feet 4 inches for a period of 12 days in solitary confinement, naked for seven of those days, generally without any light or adequate ventilation, and without implements to clean himself.

Since those cases there have been many others in this area, all concluding that such treatment of prisoners constituted cruel and unusual punishment under the Eighth Amendment. The reasoning employed in the *Fitzharris* case was, first to ask whether under all the circumstances the punishment in question was of such character as to shock general conscience or to be intolerable to fundamental fairness. Secondly the Court noted that a punishment may be cruel and unusual if greatly disproportionate to the offense for which it is imposed. And finally, a punishment may be cruel and unusual when although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim; that is, when a punishment is unnecessarily cruel in view of the purpose for which it is used. (at p. 679) Accord: see *Wright* v. *McMann*, 321 F. Supp. 127 (1970) (Prisoner confined nude in isolation cell); *Holt* v. *Sarver*, 309 F. Supp. 362 (1970) (General conditions and practices in the Arkansas state prison system); *Lollis* v. *New York State Department of Social Services*, 322 F. Supp. 473 (1970) (Children confined in isolated room in state training schools

with no recreational or reading programs); *Dearman* v. *Woodson*, 429 F. 2d 1288 (1970) (Prisoner not given food for 50½ hours).

There are several conclusions to be drawn from the reasoning of these cases.

The first is that if whipping (*Jackson* v. *Bishop supra*) or even statelessness (*Trop* v. *Dulles supra*) are cruel and unusual punishments within the meaning of the Eighth Amendment, then it follows that the extreme penalty, death, is also cruel and unusual punishment. See Mr. Justice Frankfurter's dissent in *Trop* v. *Dulles, supra* at 125.

The second conclusion that may be drawn from these cases derives from the *Jordan* formula (*Jordan* v. *Fitzharris supra*), where the Court notes that a punishment may be cruel and unusual if it goes beyond what is necessary to achieve a legitimate penal interest. Compare *Workman* v. *Commonwealth*, 429 S.W. 2d 374, 378 (1968).

That brings us to the question of the purpose for which the death penalty is designed and whether the imposition of the death penalty is necessary for that purpose.

Modern penology rejects the doctrine of vengeance. Its goals in this day and age are rehabilitation and deterrence. There is no question but that the death penalty does not rehabilitate the offender, and so the remaining question is that of deterrence.

On that score Dr. Hugo Bedau points out in his most recent article on the Death Penalty that the majority report of the Special Commission of the Massachusetts Legislature To Investigate The Effectiveness of Capital Punishment as a Deterrent to Crime concluded in its in-

terim report of October 1968 that "the death penalty is not a deterrent to crime." Bedau, *The Death Penalty in America, Review & Forecast* XXXV Federal Probation 32, 35 (June, 1971). See also H. Mattick, *The Unexamined Death*, 7-9, 31 (1963).

Bedau goes on to add that

> ". . . the belief that the death penalty is no deterrent, or (what is more to the point) that it is no better a deterrent than imprisonment has become a commonplace of contemporary criminology." *supra* at 36.

If death is no more a deterrent than imprisonment, then imposition of the death penalty fails to meet the rationality test suggested by *Jordan* v. *Fitzharris* that punishment is unnecessarily cruel if it goes beyond what is necessary to achieve its proper penal purpose. Compare the rational connection test in *Tot* v. *U. S.*, 319 U.S. 463, 467.

The death penalty is unnecessary to achieve the proper penal purposes of rehabilitation and protection of society. Therefore, it constitutes cruel and unusual punishment within the meaning of the Eighth Amendment.

B. THE INCIDENCE OF THE DEATH PENALTY RENDERS IT CRUEL AND UNUSUAL.

There were 13,650 homicides recorded in the United States in 1968. *Uniform Crime Reports* at 6 (1969). In that same year 102 defendants received the death penalty, 96 of whom were charged with murder. *45 National Prisoner Statistics* at 1 (1969).

According to J. Edgar Hoover, Director of the F.B.I., 86% of the criminal homicides occurring in 1968 were

lved. *Uniform Crime Reports* at 9 (1969). Thus out of e 11,739 cases allegedly solved, less than 1% of the fendants were given the death penalty.

Such incidence in application of the death penalty nders it unusual to say the least and cruel in its ap- ication.

Moreover, those upon whom it falls are often the or, the black, and the unpopular. See *The Challenge Crime in a Free Society*, at 143.

In addition, it is suggested that those who plead guilty e less likely to receive the death penalty than those o demand trial. Doesn't it seem anomalous to kill se whom we merely suspect are guilty, while those o we *know* are guilty escape the ultimate penalty?

Finally, it should be noted that in some states such Illinois, the jury is not requested to return a death tence in every homicide. In that state unless the prose- or qualifies the jury, submits a death penalty verdict, l asks for the death penalty, the jury will never re- n a death verdict. Such unbridled prosecutorial dis- tion as to which man shall live and which man shall the risk of death, is another factor that leads to the id conclusion that the death penalty is reserved for black, the poor, the friendless, and the unpopular.

POLICY CONSIDERATIONS — THE EFFECT OF THE DEATH PENALTY UPON OTHER ASPECTS OF THE CRIMINAL JUSTICE SYSTEM.

he Death Penalty does not only constitute cruel and sual punishment to those upon whom it is imposed on the entire criminal justice system as well. Hugo

Bedau points out that from 1960 to 1970 the average time for prisoners under sentence of death increased from 14.4 months to 32.6 months. *Bedau supra* at 33.

During this time the courts are clogged with petitions, direct appeals, collateral attacks, post conviction remedies, federal habeas corpus, etc. ad infinitum. Since informed sources estimate that over 90% of the inmates now on death row require court-appointed counsel or public defenders, the concomitant time on these cases required of attorneys is time taken away from other cases which must then be deferred and continuances sought. This places a strain on already overburdened and understaffed defender and assigned counsel systems. Thus the death penalty cases have a multiplier effect on the criminal legal system far in excess of their numbers.

Moreover, authorities such as Professor Inbau of Northwestern Law School have noted the deleterious effect death penalty cases have on the law in general. Juries compromise on verdicts to avoid inflicting the death penalty. Reviewing courts embark upon a "quest for error" "for the purpose of finding some excuse to reverse the conviction of a person sentenced to death. In doing so, rules of law are developed which plague the prosecution in its efforts in non-capital cases. . . ." *Criminal Justice Cases and Comments,* Inbau, Thompson and Sowle 1969 Vol. 1 Ch. 5 at 448.

This position is supported by the President's Commission on Law Enforcement and Administration of Justice, which noted that the death penalty "clearly has an undesirable effect on the administration of criminal justice." *The Challenge of Crime in a Free Society* at 143.

Swift justice has been characterized as the best deterrent to crime. When the courts are clogged with death cases and decisions are made contrary to the best interests of prosecutors attempting to convict non-capital defendants, perhaps a balancing of interests requires an end to capital cases to insure the real goal of the criminal justice system, a speedy and fair disposition of cases and the prevention of future crime.

CONCLUSION.

For the above and foregoing several reasons, the Amicus Curiae National Legal Aid & Defender Association urges this Honorable Court as the ultimate keeper of society's conscience under the evolving standards of decency to declare that the death penalty is cruel and unusual punishment proscribed by the Eighth Amendment.

Respectfully submitted,

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